Godsell Contracting Inc. *and* Local Union 1397, United Brotherhood of Carpenters and Joiners of America, AFL–CIO. Case 29–CA–18591

February 27, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

The issues presented for Board review are whether Administrative Law Judge Steven Fish correctly found that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employees because of their union activities and Section 8(a)(1) of the Act by interrogating employees concerning their union membership.[1] The Board has considered the decision and the record in light of the exceptions and briefs[2] and has decided to affirm the judge's rulings, findings,[3] and conclusions,[4] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Godsell Contracting Inc., Ronkonkoma, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] On September 14, 1995, the judge issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] The Respondent's request for oral argument is denied as the record and briefs adequately present the issues and positions of the parties.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951).

[4] The judge followed Board precedent in rejecting the Respondent's arguments that discriminatees Barrett and Battistelli were not employees within the meaning of Sec. 2(3) the Act because the Union sent them to ''salt'' the Respondent's job. We note that the Supreme Court recently affirmed the Board's interpretation of statutory employee status in *NLRB v. Town & Country Electric*, 116 S.Ct. 450 (1995).

Sharon Chau, Esq., for the General Counsel.
Stuart R. Jablonski, Esq. (Gabor & Gabor), of Garden City, New York, for the Respondent.
Robert Archer, Esq. (Myer, Suozzi, English & Klein, P.C.), of Mineola, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

STEVEN B. FISH, Administrative Law Judge. Pursuant to charges and amended charges filed by Local Union 1397, United Brotherhood of Carpenters of Joiners of America, AFL–CIO (the Union or the Charging Party), the Regional Director for Region 29 issued a complaint and notice of hearing on December 13, 1994,[1] alleging that Godsell Contracting Inc. (the Respondent) violated Section 8(a)(1) and (3) of the Act, by in substance interrogating its employees concerning their membership and activities on behalf of labor organizations, and by discharging and refusing to reinstate its employees James Barrett and James Battistelli, because of their activities on behalf of the Union.

The trial with respect to the allegations raised by the complaint was held before me on June 16 and July 6, 1995, in Brooklyn, New York. Briefs have been filed by all parties and have been carefully considered.[2]

Based on the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Respondent is a New York corporation with its principal office and place of business at 1899 Lakeland Avenue, Ronkonkoma, New York (the facility), where it is engaged in the nonretail construction business. During the past year, Respondent purchased and received goods valued in excess of $50,000 at its facility and at its jobsites located within the State of New York, directly from points outside the State of New York, and from other enterprises located within the State of New York, each of which other enterprises had received the goods directly from points outside the State of New York.

Respondent admits, and I so find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted and I so find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

In late August, pursuant to a written agreement with D.M. Jeffries Development Corp., Respondent began performing carpentry work at a jobsite located at 120 Mineola Blvd., Mineola, New York. Joseph Godsell is Respondent's president and an admitted supervisor and agent. He was also a member of the Union. However Respondent's employees were not represented by any labor organization.

Gregory Scapellatti was Respondent's foreman at the Mineola jobsite. He was in charge when Joseph Godsell was not at the site, and Godsell informed its employees to take orders from Scapellatti when he was not present. Scapellatti also as-

[1] All dates hereinafter are in 1994 unless otherwise indicated.

[2] Respondent's brief was mailed on the same day that it was due, and the General Counsel filed a motion that the brief should be rejected as being untimely. Inamsuch as the brief was filed only 1 day late, and absent any prejudice to the General Counsel, I shall exercise my discretion to consider the brief filed by the Respondent, and deny the General Counsel's motion that I not do so.

signed work to employees and checked their work, but had no power to hire or fire employees, to grant wage increases, or to make any other personnel decisions.

On September 14, James Battistelli and James Barrett, two members of the Union were asked by Union Business Representative and Financial Secretary Anthony Macagnone to ''salt'' a job at the Mineola jobsite. Macagnone had heard that Godsell, a union member, was doing the work nonunion. He instructed Battistelli and Barrett to go to the site and attempt to get hired by Respondent.

On that same day Battistelli and Barrett approached Godsell and asked if he was looking for employees since they were carpenters looking for work. Godsell asked Barrett if he was a union member, and Barrett replied no.[3] After some further discussion about salary, Godsell told the men to report for work the next day.

After they were hired, Battistelli and Barrett contacted Macagnone and notified him of this fact. Macagnone gave them logsheets so that they could keep a record of events on the jobsite which they filled out daily. They worked 4 full days for Respondent, September 15, 16, 19, and 20.

On September 21, at noon, pursuant to previous instructions from Macagnone, Battistelli and Barrett put on union shirts and hats and went into the building with picket signs stating that Respondent Godsell did not pay area standards and wages established by the Nassau County District Council of Carpenters. Godsell was not at the jobsite at the time. Thus Battistelli approached Scapellatti and told him as well as Dennis, a representative of the General Contractor, that they were from the Union and intended to put up an information picket line in front of the building during their lunch hour. Dennis told them that he was going to call his lawyer, and Scapellatti said that he would call Godsell. Battistelli and Barrett then left the building and began picketing for several minutes in front of the building.

Dennis emerged from inside the building and told the employees that they could not picket and had no right to be there, because it was a nonunion job. Barrett responded that the employees could not leave because they had been instructed by Union Representative Macagnone to be there.

A few minutes later, Scapalleti emerged from inside the building. He informed Battistelli and Barrett that he had spoken to Godsell by phone with regard to the picketing situation, and had received instruction from Godsell.[4] Scapellatti told the employees that Godsell had instructed him that the men were to be fired because they were union members. Scapellatti also instructed them to pack up their tools and leave. Battistelli asked if he was being fired because he was a union member, and Scapellatti replied yes. The employees then went inside the building, and packed their tools and left the site, after having called Macagnone and reported what had happened.

The above description of events is based primarily on the mutually corroborative and credible testimony of Battistelli and Barrett, which was supported by the logsheets of Battistelli which was prepared contemporaneously with the events in question. I also rely on the supportive and credible testimony of Macagnone that during the course of a meeting of the executive board, in which Godsell was present, Godsell acknowledged that he had terminated Barrett and Battistelli, because the owner of the building did not want any union problems, and that he (Godsell) did not want any union members there.

Although both Godsell and Scapellati deny that Godsell instructed Scapellati to terminate the men, it is significant that Godsell furnished no testimony as to what instructions he did give to Scapellati with regard to the picketing. Moreover Godsell admitted that when he found out that Battistelli was a union member and was picketing, and had lied to him about his union membership, he (Godsell) felt, ''betrayed as a human being, and betrayed as a man.''

The testimony of Scapellati that he did not fire the men and told them only that they had to picket outside was not persuasive. I note initially that the employees were already picketing outside the building when Scapellati spoke to them, so there would have been no necessity to tell the men to picket there. More importantly Scapellati admitted that although his responsibilities as foreman included overseeing the staff and work assignments, he never checked to see if the men were still outside after lunch. He conceded that he didn't see them come inside, and asserted that he did not know where they were all afternoon and he did not check to see if they had performed their assignments until the end of the day. Also he conceded that he did not inform Godsell that he did not know where the men were until the end of the day. The only reasonable explanation for Scapellati's lack of concern as to the employees' whereabouts is consistent with their testimony that he had terminated them in accordance with Godsell's instructions.

Respondent's reliance on the testimony of John Brinsmade, another employee who was present at the jobsite on September 21 is misplaced. Brinsmade testified that he overheard part of a discussion between Scapellati and Barrett and Battistelli, and that Scapellati did not terminate the employees. However it is clear that Brinsmade was present during the discussion at 12 noon inside the building, when the employees informed Scapellati of their intentions to picket. Brinsmade was not present during the discharge conversation, which occurred several minutes later, outside the premises while the employees were picketing and after Scapellati had spoken on the phone to Godsell.

I also find Brinsmade's testimony concerning his observation of the sheetrock to be unpersuasive. He testified that after the employees left he noticed written on the sheetrock the words ''we are leaving the job.'' However, he admitted that he did not see either Barrett or Battistelli write anything on the sheetrock, and that no signatures appeared thereon. Moreover, I find it unlikely that the employees would write any such comments on the sheetrock. Thus even if as Respondent contends the employees had lied about their being fired in order to establish an unfair labor practice, it would make no sense for them to have written anything on the sheetrocks that would suggest that their departures may have been voluntary. Therefore I conclude that Brisnsmade's testimony is insufficient to establish that either employee had written anything on sheetrocks, and I credit Battistelli's testimony that they did not write any kind of message on the sheetrocks on the day of their discharges.

[3] Barrett admitted that he had been instructed by the Union during the course of his training for the ''salting'' program, that he was to deny to employers that he was a union member if that question were asked.

[4] Both Godsell and Scapellatti concede that they had such a telephone conversation.

Shortly after their discharge, both Battistelli and Barrett spoke to Godsell on the phone and were told to come in and pick up their paychecks. They had no conversation with Godsell concerning the circumstances of their discharge, or whether or not they had been discharged. It is noteworthy that Godsell did not ask the employees if or why they had left the job, which in my view he would likely have done, had they in fact quit as Respondent contends. The fact that Godsell did not make such an inquiry of the employees lends further credence to my findings above, that he had in fact ordered them to be discharged, and had no need to inquire as to why they had left the job.

The instant charge was thereafter filed on October 5, resulting in the issuance of the complaint here on December 13. Thereafter on or about December 14, Respondent mailed identical undated letters to both Barrett and Battistelli. The letters invites the employees to report for work in the near future for work to be completed at 120 Mineola Blvd. The letter further states that the job will be starting shortly with possibly another phase to start, and requests that the employees call if they wish to work, and to leave a message if Godsell is not present.

Respondent by letter dated December 21 to both employees, stated that he had not heard from them in response to ''future work coming up in the near future,'' and that he had sent a letter to them on December 14 requesting their response on an invitation to work. The letter repeats that they should call Godsell in his office, and if he is not present, to leave a message.

Battistelli received both registered letters on the same day, since the first letter had been incorrectly addressed. Within a day or two of his receipt of the letters, Battistelli called Godsell at Respondent's place of business, and left a message on the answering machine that he would be more than happy to come back and work for Respondent, and left his telephone number as well. Battistelli also spoke to Macagnone about the offer, and he advised Battistelli to accept the offer to return to work.

Barrett called Respondent shortly after receiving the December 21 letter, and left a message that he would be glad to go back to work for Respondent in the future as the letter stated, but that he was working at the time.

Neither Barrett nor Battistelli received any further communications from Respondent, subsequent to their leaving messages on Respondent's answering machine.

The above findings with respect to the letters offering jobs to the employees ''in the near future,'' and their responses are based on the undisputed testimony of Barrett and Battistelli. Godsell did not furnish any testimony concerning the letters, or the employees' responses, and gave no explanation as to why he did not respond to the messages left on his machine. He also did not testify as to precisely when work at the Mineola jobsite started up again subsequent to December 21.

Respondent introduced into the record the March 1995 issue of the Nassau County Carpenter, which is a newsletter sent out to members of the Nassau County District Council of Carpenters, which includes members of the Charging Party. In that publication an article appeared entitled ''Salting Report.'' The article thanked 13 named members including Barrett and Battistelli, ''for successfully salting nonunion companies to cause dissension and bring National Labor Relations Board charges against these companies.'' Macagnone contributed to the writing of this article and explained that by causing ''dissension'' he meant by telling employees that they were not getting paid the proper wages, and not getting the proper benefits, they become unhappy, and either they try to join the Union or try to get more money from their boss. Additionally dissension means according to Macagnone making employees uncomfortable about their present working conditions with the hope that they would try to improve and better themselves.

III. ANALYSIS

A. *The Alleged Interrogation*

Respondent does not dispute the fact that its president Joseph Godsell interrogated Barrett as to whether he was a member of the Union. Barrett replied that he was not. Consequently both he and Battistelli were hired. Such questioning in the context of job interviews has long been held to be inherently coercive interrogation and violative of Section 8(a)(1) of the Act. *Century Wine & Spirits*, 304 NLRB 338, 359 (1991); *Shannopin Mining Co.*, 302 NLRB 791, 795 (1991); *Service Master All Cleaning Services*, 267 NLRB 875 (1983). I so find.

B. *The Alleged Unlawful Discharges*

The credited evidence, as disclosed above, established that while the employees were picketing in front of the jobsite during their lunch hour, they were informed by Scapellati that he had just spoken to Godsell, and was told to inform the employees that they were discharged because they were union members.

Respondent argues that since Scapellati was not a supervisor and had no power or authority to terminate anyone, that the employees were not discharged, noting particularly that the employees never confirmed with Godsell that they had been terminated by Respondent. I do not agree.

Whether or not Scapellati was a supervisor of Respondent within the meaning of Section 2(11) of the Act, the more important issue is whether he was acting as an agent of Respondent when he spoke to the employees. The test for such a determination is whether or not based on all the facts and circumstances, employees could reasonably believe that he was acting on behalf of Respondent. *Three Sisters Sportswear*, 312 NLRB 853, 864–865 (1993); *Community Cash Stores*, 238 NLRB 265 (1978).

Here, since Scapellati informed the employees that he was transmitting instructions to them directly from Godsell[5] that they were fired, clearly that test has been met and employees could reasonably believe that he was speaking on behalf of Respondent. *EDP Medical Computer Systems*, 284 NLRB 1232, 1265 (1980); *United Cloth Co.*, 278 NLRB 583, 586 (1980); *Wm. Chalson & Co.*, 252 NLRB 25, 33–34 (1980).

Therefore I conclude that Scapellati was acting as an agent for Respondent while notifying Barrett and Battiselli that they were discharged, and that in fact the employees were terminated by Respondent on September 21. Inasmuch as the employees were told that they were discharged because they were union members, Godsell admitted that he felt ''be-

[5] Indeed it is admitted that Godsell and Scapellati had a telephone conversation immediately before Scapellati spoke to the employees.

trayed'' when he found out that they were union members, and Godsell admitted at the union meeting that he terminated the employees because the owner of the building didn't want union problems on the job, a strong prima facie case has been established that the discharges were motivated by their activities on behalf of the Union and membership in the Union. Such conduct is violative of Section 8(a)(1) and (3) of the Act, unless Respondent can demonstrate that it would have taken the same action against the employees, absent their protected conduct. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

The Respondent has made no attempt to meet its *Wright Line* burden of proof, since its position which I have rejected was that the employees had not been terminated. However Respondent has raised the defense that Barrett and Battistelli should not be considered employees within the meaning of the Act, since they were sent by the Union to ''salt'' the job. Respondent notes particularly that the employees were sent by the Union to the job, picketed the job pursuant to the Union's instructions, and consulted the Union as to whether they should accept Respondent's ''offer'' to return to work. None of these facts either singly or collectively deprive the employees of their status as employees under Section 2(3) of the Act. *Corella Electric*, 317 NLRB 147 (1995); *Sunland Construction Co.*, 309 NLRB 1224, 1229–1230 (1992), affd. 4 F.3d 1000 (11th Cir. 1993); *Wilmar Electric Service v. NLRB*, 962 F.2d 1327, 1329–1331 (D.C. Cir. 1992).[6]

Respondent also places heavy reliance on the District Council newsletter which congratulated Barrett and Battiselli among other members for successfully salting nonunion companies ''to cause dissension and bring NLRB charges against these companies.'' To the extent that this statement infers that one of the purposes of ''salting'' was to cause dissension among employees of nonunion employers, the word is too vague and subject to various interpretations to conclude that salting becomes unprotected activity or deprives ''salts'' of employee status. Moreover, neither Barrett nor Batistelli recalled the term ''dissension'' being used in their ''salt'' training, and more significantly the record contains no evidence that either of them engaged in any activity that caused ''dissension'' amongst Respondents employees, or any activity that might render their conduct unprotected. To the extent that it might be inferred that one of the purposes of the ''salting'' program was to provoke nonunion employers to commit unfair labor practices, I conclude that even if true, it would not be a defense to Respondent's conduct. It was Respondent's decision to terminate these employees because of their union membership and activities, and it was not compelled to do so by the Union, even though the Union may have hoped for such a result.

Accordingly, based on the foregoing, I conclude that Respondent has violated Section 8(a)(1) and (3) of the Act by discharging Barrett and Battistelli.

THE REMEDY

Having found that Respondent has committed certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action necessary to effectuate the purposes of the Act.

Respondent contends that its letters to the employees in December offering them work extinguishes its back liability and its reinstatement obligation. I disagree. The Board has long held that to constitute a valid offer of reinstatement, which would toll backpay, the ''communication must be specific, unequivocal, and unconditional.'' *Jones Plumbing*, 277 NLRB 437, 450 (1985); *Standard Aggregate Corp.*, 213 NLRB 154 (1974). In my view, an offer of a job ''in the near future'' does not constitute an ''unequivocal or specific'' offer of reinstatement, and does not toll backpay nor extinguish Respondent's reinstatement obligation to the discriminatorily discharged employees. *John Cuneo, Inc.*, 276 NLRB 75, 80–81 (1985); *Jones*, supra.

Moreover, even if I were to find the offers to have been sufficiently unequivocal and specific to require the discriminatees to reply, I have found that both Barrett and Battistelli did respond by leaving a message on Respondent's answering machine that they were interested in accepting Respondent's offer of employment.

Since Respondent failed to respond to the messages left by the discriminatees, and furnished no explanation why it did not do so, I conclude that the backpay obligation of Respondent is still continuing, and that it must offer the employees reinstatement to their former positions of employment. Backpay shall be calculated as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 8(a)(1) and (3) of the Act.

3. By interrogating job applicants concerning their membership in and activities on behalf of labor organizations, Respondent has violated Section 8(a)(1) of the Act.

4. By discharging on September 21, 1994, and thereafter refusing to reinstate James Battistelli and James Barrett, because of their activities on behalf of and membership in the Union, Respondent has violated Section 8(a)(1) and (3) of the Act.

5. The above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The Respondent, Godsell Contracting Inc., Ronkonkoma, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating job applicants or employees concerning their membership in, activities on behalf of, and sympathies for labor organizations.

[6] I would note that there is no evidence here that either discriminatee was paid by the Union for ''salting'' the job, as was the case in *Sunland* and *Wilmar*, supra.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Discharging or refusing to reinstate its employees because of their membership in or activities on behalf of Local Union 1397, United Brotherhood of Carpenters and Joiners of America, AFL–CIO.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer James Battistelli and James Barrett immediate and full reinstatement to their former positions of employment or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Ronkonkoma, New York facility, copies of the attached notice marked ''Appendix.''[8] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees, are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT interrogate job applicants or our employees concerning their membership in, activities on behalf of, or sympathies for labor organizations.

WE WILL NOT discharge or refuse to reinstate our employees because of their membership in or activities on behalf of Local Union 1397, United Brotherhood of Carpenters and Joiners of America, AFL–CIO.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer James Barrett and James Battastelli immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL notify James Barrett and James Battastelli that we have removed from our files any reference to their discharges and that the discharges will not be used against them in any way.

GODSELL CONTRACTING, INC.,